Public Prosecutor v Jorge Enrique Pellon Tellon

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NOS 47-3 OF 1997 AND 47-4 OF 1997
FAIZA TAMBY CHIK J
13 AUGUST 1997

Criminal Law *— Dangerous Drugs Act — Trafficking — Drugs in transit — Drugs discovered on accused at transit lounge of airport and at police station — Whether accused to be charged under s 39B(1)(a) or s 21(6) of the Dangerous Drugs Act 1952 — Dangerous Drugs Act 1952 ss 21(6) & 39B(1)(a)*

Criminal Law *— Dangerous Drugs Act — Trafficking — Drugs found on accused following remand at transit lounge of international airport — Accused brought out of airport to police station on special entry pass — Whether accused deemed to have entered Malaysia — Whether accused guilty of trafficking*

Criminal Procedure *— Charge — Alteration or amendment of — Whether court in amending charge will be usurping powers of Public Prosecutor*

On 26 November 1996, the accused was on a flight from Buenos Aires, Argentina to Den Pasar, Bali, Indonesia. Whilst in transit at Gate 13 at the Sultan Abdul Aziz Shah Airport ('LTAAS') at around 8.35am, after the accused had walked through a machine detector, he was subjected to a full body examination and nine packages of cocaine were discovered strapped to the accused's inner short pants. The accused was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in cocaine ('the second amended charge'). At all times, the accused's passport bore no immigration chop to indicate that he had landed in West Malaysia. The accused was later issued with a special pass under reg 14(3) of the Immigration Regulations 1963 ('the Regulations') and escorted under strict police control to the Damansara Utama police station where upon a further body inspection, two more packages of cocaine were discovered in the accused's shoes. The accused was then additionally charged under s 39B(1)(a) of the Act for trafficking in cocaine ('the first amended charge'). The issue before the learned judge was whether the charges against the accused were to be amended to charges under s 21(6) of the Act. The deputy public prosecutor contended that it was solely within the province of the Public Prosecutor to decide on the appropriate provisions under which the accused was to be charged.

Held, amending the charges to charges under s 21(6) of the Act and convicting the accused on both counts:

(1) The Public Prosecutor shall have powers exercisable at his discretion to institute, conduct or discontinue any proceedings for any offence based on evidence that he has upon investigation but once the case comes to the court, the power of the Public Prosecutor ceases there and immediately the court is seized with jurisdiction to try the case in accordance with the time-honoured rules of procedure and rules of evidence (see p 48H–I).

(2) With regard to the second amended charge, the cocaine was found on the accused when he was in transit at Gate 13. It was inconceivable that Parliament would pass a legislation such as s 21(6) of the Act if it was intended to charge transit passengers under s 39B of the same Act. It stood to reason that Parliament created s 21 for dangerous drugs in transit as a special offence to deal with offenders who brought dangerous drugs into Malaysia in transit (see p 49B–D).

(3) With regard to the first amended charge, the accused was issued with a special pass under reg 14(3) of the Regulations for the purposes of checking out to follow the inspector to the police station. The word 'entry' into Malaysia is defined by s 2 of the Immigration Act 1959/63 to exclude an entry made for the purpose of complying with that Act or an entry expressly or impliedly sanctioned by an immigration officer for the purpose of any enquiry or detention under that Act. Therefore, the accused could not be deemed to have entered Malaysia and consequently could not be said to have committed an offence of trafficking drugs at the police station. Furthermore, the accused lacked the mental element to bring the cocaine to the police station as the cocaine was destined for Den Pasar, Bali, Indonesia and it was evident that the accused's conduct at the police station was involuntary. Therefore, the accused must be charged under s 21(6) of the Act at the transit lounge at Gate 13, LTSAAS as the cocaine in his shoes would have been discovered and found there (see pp 49H–I and 50A–F).

(4) Weighing all the evidence before the court, s 37 of the Act was not applicable to both the amended charges (see p 50I).

(5) The accused was guilty as charged under both the amended charges and should be sentenced to three years' imprisonment to run concurrently from the date of arrest (see p 51E–F).

[Bahasa Malaysia summary

Pada 26 November 1996, tertuduh berada dalam perjalanan kapal terbang dari Buenos Aires, Argentina ke Den Pasar, Bali, Indonesia. Semasa dalam perjalanan di Pintu 13 di Lapangan Terbang Sultan Abdul Aziz Shah ('LTAAS') pada kira-kira pukul 8.35 pagi, selepas tertuduh melalui suatu pengesan mesin, dia telah tertakluk kepada pemeriksaan penuh tubuh dan sembilan bungkusan kokain dijumpai diikat kepada seluar dalam tertuduh. Tertuduh dipertuduhkan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') kerana mengedar kokain ('pertuduhan terpinda kedua'). Pada semua masa, pasport tertuduh tidak membawa sebarang tanda bagi menunjukkan dia telah mendarat di Semenanjung Malaysia. Tertuduh kemudiannya dikeluarkan dengan satu pas khas di bawah peraturan 14(3) Peraturan Imigresen 1963 ('Peraturan tersebut') dan diiringi di bawah kawalan polis yang ketat ke balai polis Damansara Utama di mana selepas menjalani pemeriksaan tubuh yang lanjut, dua lagi

bungkusan kokain dijumpai dalam kasut tertuduh. Tertuduh kemudiannya dipertuduhkan selanjutnya di bawah s 39B(1)(a) Akta tersebut kerana mengedar kokain ('pertuduhan terpinda pertama'). Isu di hadapan hakim yang arif adalah sama ada pertuduhan terhadap tertuduh harus dipinda kepada pertuduhan di bawah s 21(6) Akta tersebut. Timbalan pendakwa raya menghujahkan bahawa ia terletak dalam bidang kuasa Pendakwa Raya untuk memutuskan peruntukan yang wajar di bawah mana tertuduh akan dipertuduhkan.

Diputuskan, meminda pertuduhan kepada pertuduhan di bawah s 21(6) Akta tersebut dan menyabit tertuduh atas kedua-dua pertuduhan:

(1) Pendakwa Raya haruslah mempunyai kuasa yang boleh dilaksanakan berdasarkan budi bicaranya untuk memulakan, menjalankan atau memberhentikan mana-mana prosiding untuk apa-apa kesalahan berdasarkan keterangan yang berada dengannya pada siasatan tetapi sebaik saja kes dibicarakan, kuasa Pendakwa Raya berhenti di situ dan dengan serta merta mahkamah mempunyai bidang kuasa untuk membicara kes menurut kaedah prosedur dan rukun keterangan yang tak lapuk dek zaman (lihat ms 48H–I).

(2) Berhubung dengan pertuduhan terpinda kedua, kokain dijumpai pada tertuduh sewaktu dia dalam perjalanan di Pintu 13. Tidak dapat dijangka bahawa Parlimen akan meluluskan perundangan seperti s 21(6) Akta tersebut andainya ia bertujuan mempertuduhkan penumpang-penumpang dalam perjalanan di bawah s 39B Akta yang sama. Adalah munasabah bahawa Parlimen mewujudkan s 21 untuk dadah berbahaya dalam perjalanan sebagai kesalahan khas bagi menguruskan pesalah-pesalah yang membawa dadah berbahaya ke Malaysia dalam perjalanan (lihat ms 49B–D).

(3) Berkenaan pertuduhan terpinda pertama, tertuduh dikeluarkan dengan suatu pas khas di bawah peraturan 14(3) Peraturan tersebut untuk tujuan mendaftar keluar untuk mengikut inspektor ke balai polis. Perkataan 'kemasukan' ke Malaysia ditakrifkan oleh s 2 Akta Imigresen 1959/63 untuk mengecualikan kemasukan yang dibuat untuk tujuan mematuhi Akta itu atau kemasukan yang dibenarkan oleh seorang pegawai imigresen secara nyata atau tersirat untuk tujuan siasatan atau tahanan di bawah Akta itu. Oleh itu, tertuduh tidak boleh dianggap telah memasuki Malaysia dan berikutnya tidak boleh dikatakan telah melakukan suatu kesalahan pengedaran dadah di balai polis. Tambahan pula, tertuduh tidak mempunyai unsur mental untuk membawa kokain ke balai polis kerana kokain adalah dalam perjalanan ke Den Pasar, Bali, Indonesia dan adalah jelas bahawa kelakuan tertuduh di balai polis adalah bukan secara sukarela. Dengan itu, tertuduh mestilah dipertuduhkan di bawah s 21(6) Akta tersebut di ruang menunggu di Pintu 13 LTSAAS kerana kokain dalam kasutnya telah dijumpai di sini (lihat ms 49H–I dan 50A–F).

A (4) Dengan mempertimbangkan semua keterangan di hadapan mahkamah, s 37 Akta tersebut tidak terpakai kepada kedua-dua pertuduhan terpinda (lihat ms 50I).

(5) Tertuduh adalah bersalah seperti dipertuduhkan di bawah kedua-dua pertuduhan terpinda dan patut dijatuhkan hukuman
B pemenjaraan selama tiga tahun yang hendaklah berjalan serentak mulai dari tarikh tangkapan (lihat ms 51E–F).]

[*Editorial Note*: The appellant has appealed to the Court of Appeal vide Criminal Appeal No B–05–59 of 1997.]

C **Notes**

For cases on the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 30–233.

For cases on alteration or amendment of charge, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 615–656.

D **Case referred to**

Haughton v Smith [1973] 3 All ER 1109 (refd)

Legislation referred to

E Criminal Procedure Code (FMS Cap 6) s 173(h)(2)
Dangerous Drugs Act 1952 ss 2, 21(6), 37, 39B(1)(a), (2)
Federal Constitution art 145(3)
Immigration Act 1959/63 s 2
Immigration Regulations 1963 reg 14(3)

F **Appeal from**: Kes Tangkap No 81–30 of 1996 (Magistrate's Court, Petaling Jaya)

Hanafiah bin Zakaria (Deputy Public Prosecutor) for the appellant.
Karpal Singh (*Gobind Singh Deo* with him) for the respondent.

G **Faiza Tamby Chik J**: The accused Jorge Enrique Pellon Tellon, a Peruvian national, is facing two charges of trafficking in cocaine; one at about 8.30am at Gate 13 Terminal 1, Sultan Abdul Aziz Shah Airport ('LTSAAS') ('the second amended charge') and the other at about 1.20pm at the Damansara Utama police station ('the first amended charge'). Both
H incidents took place on 26 November 1996. Both charges were brought under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and are punishable under s 39B(2) of the same Act.

Facts of the case

I The accused was on flight from Buenos Aires, Argentina to Den Pasar, Bali in Indonesia. He was in transit at Terminal 1, LTSAAS on 26 November 1996 where he was stopped at about 8.35am at Gate 13 by the airport security guard, Mohd Insahpere bin Mohd Yusof (PW5) as he walked through the machine detector. When a strict full body examination

was carried out by PW5 at the special examination room there, PW5 discovered and found on the accused nine packages of cocaine strapped to his inner short pants. The weight of cocaine obtained after an analysis of the nine packages by the chemist was 1,846.4g. This became the subject matter of the second amended charge.

At about 12.35pm the accused was taken from the Balai Polis LTSAAS by Insp 13128 Ricky Tan Yow Hock (PW6) escorted by Detective RF109123 Ong Keng Hwa (PW3) to the Damansara Utama police station. There, before the accused was put into the police lock-up he was again bodily examined as required by the Lock-up Rules by Constable 88632 Mohd Rozi bin Mustapha (PW7). PW7 discovered and found in the shoes worn by the accused two more packages of cocaine. The weight of the cocaine obtained after an analysis of the two packages by the chemist was 414.8g. This became the subject matter of the first amended charge.

The second amended charge

In respect of the second amended charge it is in evidence, not contradicted by the prosecution, that the cocaine was found at the time when the accused was in transit at Gate 13. PW5 said under cross-examination:

> OKT dalam transit semasa ditangkap. Jadi perlukan special pass (P28) untuk dibawa masuk ke West Malaysia.

The special pass was issued under reg 14(3) of the Immigration Regulations 1963, enabling the accused to be permitted to enter West Malaysia. It is also in evidence that the accused's passport bore no immigration chop at all that he had landed in West Malaysia. The learned deputy public prosecutor submitted that it is purely within the sole province of the Public Prosecutor whether to charge the accused under s 39B or under s 21(6) of the DDA. He further submitted that the court would be usurping the function of the Public Prosecutor if it amends the charge to one under s 21(6) of the DDA. He contended that the transit lounge would be flooded with international drugs traffickers if transit passengers who bring dangerous drugs into Malaysia in transit are charged under the lesser offence. The deputy public prosecutor cited me art 145(3) of the Federal Constitution in support of his contention. Let me state categorically here that I am in full agreement with the learned deputy public prosecutor on the power of the Honourable Attorney General as Public Prosecutor as contained in the Article aforesaid of the Federal Constitution. Nonetheless, let me straight away inform him and announce to all and sundry that the court would not even dream of usurping the powers of the Public Prosecutor. The Public Prosecutor shall have powers exercisable at his discretion, to institute conduct or discontinue any proceeding for an offence based on evidence that he has had upon investigation but once the case comes to court the power of the Public Prosecutor ceases there and immediately the court is seized with jurisdiction to try the case in accordance with the time-honoured rules of procedure and rules of evidence. Section 173(h)(2) of the Criminal Procedure Code (FMS Cap 6) provides:

> If the Court finds that the prima facie case has been made out against the Accused on an offence other than the offence charged which such Court is competent to try and which in the opinion of the Court it ought to try, the Court shall amend the charge.

Therefore it is plain to see that it is statutorily provided that the court can amend the charge against the accused based on the evidence taken at the trial. In this case the cocaine was found on the accused when he was in transit at Gate 13. It is inconceivable that Parliament would pass a legislation such as s 21(6) of the DDA if it intends to charge transit passengers under s 39B of the same Act. Ours is a civilized society and we practise the highest standard of morality. I do not think Parliament in its wisdom wants to punish those whom bring any dangerous drugs into Malaysia in transit under the death penalty section of s 39B rather than under the fining or imprisoning of s 21(6) of the DDA. I am of the view that international travellers would not avoid Malaysian airports as we are well known among the international communities to practise fairness and fair play in the administration of our laws. I am of the view that it stands to reason that Parliament created s 21 for dangerous drugs in transit as a special offence. It is a specific section to deal with offenders who bring dangerous drugs into Malaysia in transit. The world all over knows about our harsh mandatory death sentence drug laws. Equally too the world also knows about our fair and just administration of justice. The influx of international tourists and foreign investors that crowded our five-star hotels is a living testimony of our standard and integrity. Even the illegal immigrants, we were told, especially the Indonesians, kept on coming back in search of employment over here. Therefore, I conclude that s 21(6) of the DDA is there to deal with dangerous drugs in transit.

The first amended charge

A matter to be considered in relation to the first amended charge is the words 'in transit' in the DDA. It is defined in s 2 as meaning:

> ... taken or sent from any country and brought into Malaysia by land, air or water (whether or not landed or transshipped in Malaysia) for the sole purpose of being carried to another country either by the same or another conveyance;

For all intents and purposes, the accused did not land in Malaysia. It is in evidence that the accused's passport bore no immigration chop at all to indicate that he had landed in West Malaysia. 'Entry' into Malaysia in s 2 of the Immigration Act 1959/63 is stated to mean in the case of a person arriving by air at an authorized airport, leaving the precincts of the airport provided that it shall not include in any case an entry made for the purpose of complying with that Act or an entry expressly or impliedly sanctioned by an immigration officer for the purpose of any enquiry or detention under that Act. The accused was issued with a special pass under reg 14(3) of the Immigration Regulations 1963. In this case, the accused was issued with the special pass for the purpose of reporting to Kpl 46444 Saad Sibun (SP2) for checking out to follow Insp Ricky Tan to the Damansara Utama police station.

Therefore, I am of the view that the accused is deemed not to have entered Malaysia and consequently he cannot be said to have committed an offence of trafficking in drugs at the Damansara Utama police station.

There is another cogent reason. The accused could not be charged for trafficking at the Damansara Utama police station because he lacked the mental element to bring the cocaine there. The cocaine was for destined Den Pasar, Bali, Indonesia. *Nigam on Law of Crimes in India* Vol 1 (1965) at pp 42–43 (see *Penal Code of Singapore and State of Malaya — Cases Materials and Comments* Vol 1 by Koh Kheng Lian and Myint Soe) states:

> However the two elements actus reus and mens rea are distinct elements of a crime. They must always be distinguished and must be present in order that a crime may be constituted. The mental element or mens rea in modern time means that the person's conduct must be voluntary and it must also be actuated by a guilty mind, while actus reus denotes the physical result of the conduct, namely, it should be a violation of some law statutory or otherwise, prohibiting or commending the conduct.

It is evident in this case that the accused's conduct at the Damansara Utama police station was involuntary. *Osborn's Concise Law Dictionary* (7th Ed, 1983) by Roger Bird published by Sweet & Maxwell defines actus reus as the elements of an offence excluding those which concern the mind of the accused. The phrase derives, I believe, from a mistranslation of the Latin aphorism '*Actus non facit reum nisi mens sit rea*'. Properly translated, this means 'an act does not make a man guilty of a crime unless his mind be also guilty'. It is thus not the actus which is reus but the man and his mind respectively.' See *Haughton v Smith* [1973] 3 All ER 1109 (HL) at pp 1113–1114 per Lord Hailsham LC. Therefore the accused must be charged at the transit lounge at Gate 13, Terminal 1, LTSAAS because the cocaine in his shoes would have been discovered and found there. However, he could not be charged under s 39B of the DDA at the transit lounge at Gate 13. Parliament has specifically provided a special section for offenders who bring any dangerous drugs into Malaysia in transit. The accused must be charged under s 21(6) of the DDA. It would be incongruous for Parliament to intend otherwise.

In the circumstances of this case, it could be safely assumed that the two packages of cocaine in the shoes worn by the accused were there when PW5 discovered and found the nine packages of cocaine strapped up his inner pants with adhesive plaster. There was no evidence to show that the accused opened or parted with his shoes until he reached the Damansara Utama police station. There was no evidence to show that the accused was taken anywhere. What was in evidence was the fact that the accused was taken under strict police control by PW6, guarded by PW3 to the Damansara Utama police station.

In conclusion, weighing all the evidence before the court I am of the opinion that in this case s 37 of the DDA is not applicable to both the amended charges.

A The accused was caught physically in possession of the cocaine in transit at Gate 13; the main bulk of the cocaine was discovered and found there. A prima facie case is one which is established by sufficient evidence. There must be some credible evidence to prove the essential ingredients of the charge which must include the identity of the accused. In this case the court finds that a prima facie case has been made out against the accused B on the offence under s 21(6) of the DDA. For that reason, I conclude that it would be proper that the accused be charged for the lesser offence of bringing cocaine into Malaysia in transit under s 21(6) of the DDA.

Mr Karpal Singh submitted that the two amended charges should be consolidated as the cocaine in the shoes worn by the accused would have C been discovered and found at Gate 13, Terminal 1 had PW5 made a 100% check. I disagreed with his submission. The two amended charges should remain separate because of the different circumstances of their discovery.

Both the amended charges were accordingly amended again from s 39B to s 21(6) of the DDA. Both the amended charges as amended were read and D explained to the accused who understood and pleaded guilty to both the charges having understood the nature and consequences of his plea.

The facts of the case were as stated by the learned deputy public Prosecutor as per the evidence of SP5, SP6, SP7, SP1 to SP4. In mitigation of sentence, Mr Karpal Singh stated that the accused came from a poor E family in Peru, Lima and needed the money from the drug transaction to pay for his university education. At the time of commission of the said offences, he was 20 years of age and the accused had no previous conviction. I find the accused guilty as charged and convicted him of both the amended charges as amended. Consequently, I hereby sentence the accused to three years' imprisonment for each amended offence and conviction with effect F from the date of arrest having regard to his age and the fact that he was a 20-year old student from Peru, Lima who thought he would earn some money to pay for his university education and pleaded guilty to both the amended charges as amended. Both sentences are to run concurrently.

G *Order accordingly.*

Reported by Lew Chee Seong

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